STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B090

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MADINA BUHENDWA,

Complainant,

VS.

DEPARTMENT OF HIGHER EDUCATION, REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

The hearing was held on February 12, 1997, in Denver before Administrative Law Judge Margot W. Jones. Complainant appeared at the hearing pro se. Respondent appeared at the hearing through Assistant University Counsel Elvira Strehle Henson.

Complainant testified in her own behalf and called no other witnesses. Complainant did not offer exhibits into evidence at hearing.

Respondent did not call witnesses to testify at hearing. Respondent did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals the respondent's decision to place her on leave without pay when she exhausted all accrued leave and was unable to return to work under State Personnel Board Rule, R7-2-5.

ISSUES

The following issues were considered at the hearing:

- 1. whether complainant sustained her burden of proof to establish that respondent's actions were arbitrary, capricious, or contrary to rule or law, and
- 2. whether complainant exhausted all accrued leave and was unable to return to work

PRELIMINARY MATTERS

On January 28, 1997, respondent moved to dismiss the appeal on the grounds that the Board lacked jurisdiction to consider an appeal under Board Rule, R7-2-5, because the action taken by respondent did not adversely affect pay, status, or tenure. Respondent's motion was denied. Complainant appealed respondent's decision to place her on leave without pay when she exhausted all accrued leave and was unable to return to work. This action taken under R7-2-5 was an action affecting pay over which the Board has jurisdiction.

FINDINGS OF FACT

- 1. Complainant Madina Buhendwa (Buhendwa) was a food service worker employed by the University of Colorado at Boulder (University). She began her employment with the University in August, 1992.
- 2. In 1994 or 1995, Buhendwa fell and injured herself in the performance of her job duties. Her injury made it increasingly difficult for her to work. From August 6, 1996, to November 5, 1996, she remained off work. During this period, Buhendwa was granted leave under the Family Medical Leave Act.
- 3. On November 11, 1996, Buhendwa reached maximum medical improvement. She was unable to perform all the duties of her position as a food service worker. Buhendwa was not permitted to return to work on light duty.
- 4. In November, 1996, Buhendwa accrued 50.5 hours of leave. She exhausted her accrued leave on December 5, 1996. She was still unable to return to work. Under Board Rule, R7-2-5, Buhendwa was placed on leave without pay for the period from December 6, 1996, to January 2, 1997.
- 5. On December 11, 1996, Buhendwa was provided written notice of the University's decision to place her on leave without pay. She was advised in this notice that she had the right to appeal this decision to the State Personnel Board.

DISCUSSION

The burden of proof is on complainant in a case in which the agency takes non-disciplinary action which affects the employee's pay. Renteria v. Colorado Department of Personnel, 811 P.2d 797 (Colo. 1991). Thus, complainant had the burden to establish that the action taken by respondent placing her on leave without pay was arbitrary, capricious or contrary to rule or law. The

arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

State Personnel Board Rules, R7-2-5, upon which respondent's decision to place complainant on leave without pay states, in pertinent part, that:

- (D) When an employee has exhausted all accrued sick leave and is still unable to return to work, the appointing authority:
 - (3) If the employee is unable to return to work after all accrued leave is used . . ., the appointing authority may: . . . (b) grant leave without pay if all paid leave is exhausted;

Complainant testified that she injured herself and she was unable to perform the duties of her position. She testified that her physician directed her not to work. Complainant concedes that she remained off the job exhausting all sick and annual leave. Complainant contends that she should not be placed on leave without pay. Complainant wants to receive her salary during her continued absence from work.

Complainant presented no evidence to support the conclusion that respondent's decision to place her on leave without pay was arbitrary, capricious or contrary to rule or law. The testimony complainant offered supported the decision to place her on leave without pay.

At hearing, at the conclusion of complainant's case, respondent moved to dismiss the appeal on the grounds that complainant failed to present any evidence that respondent's action was arbitrary, capricious, or contrary to rule or law.

Respondent's motion was granted. Complainant failed to present any evidence that the decision to place her on leave without pay was arbitrary, capricious, or contrary to rule or law. Under Board Rule, R7-2-5, respondent is permitted to place complainant on leave without pay when complainant exhausts all leave and is unable to return to work.

CONCLUSIONS OF LAW

- 1. Complainant exhausted all accrued leave and was unable to return to work.
- 2. Complainant failed to present evidence at hearing to sustain her burden of proof to establish that the decision to place her on leave without pay was arbitrary, capricious or contrary to rule or law.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

Margot W. Jones Administrative Law Judge